E COPY

Office - Supreme Court
FILED
OCT 1 19
HAROLD B. WILLEY,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19

No. 386

KISS & COMPANY, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

STATEMENT AS TO JURISDICTION

JOHN B. GAGE,
A. ALVIS LAYNE, JR.,
JOHN KIRKLAND,
H. CHARLES ETHERIDGE,
Counsel for Appellant.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Opinion below	1
Jurisdiction	2
Questions involved	2
Statutes involved	3
Statement	3
The questions involved are substantial	6
Appendix "A"—Per curiam opinion of the United States District Court for the Western District of Missouri	15
Appendix "B"—Statutes involved	30

Table of Cases Cited

Akers Motor Lines, Inc. v. *Malone Freight Lines Inc.*, 53 M.C.C. 353	12
American Trucking Associations v. *United States*, 326 U.S. 77	2
Interstate Commerce Commission v. *G. & M. Motor Transfer Co., Inc.*, 64 F. Supp. 302	13
Interstate Commerce Commission v. *Louisville & N. R. Co.*, 227 U.S. 88	11
Interstate Commerce Commission v. *Southwest Freight Lines*, 86 F. Supp. 587	13
Malone Freight Lines, Inc. v. *U.S.*, 107 F. Supp. 946, 344 U.S. 925	12
Securities & Exchange Commission v. *Chenery Corporation*, 318 U.S. 80	9
United States v. *Abilene & S. R. Co.*, 265 U.S. 274	11
United States v. *Detroit and Cleveland Navigation Co.*, 326 U.S. 236	2
United States v. *Pierce Auto Freight Lines*, 327 U.S. 515	2

Statutes Cited

	Page
Administrative Procedure Act:	
Section 5 (5 U.S.C. 1004)	3, 31
Section 52 (5 U.S.C. 1004a)	10
Section 7 (5 U.S.C. 1006)	3, 33
Section 7d (5 U.S.C. 1006d)	11
Section 8	4
Section 10e(5 U.S.C. 1009e)	3, 34
Interstate Commerce Act, Section 204(c) (49 U.S.C. 304c)	3, 30
Rules of Interstate Commerce Act, Rule 102	3
United States Code, Title 28:	
Section 1253	2
Section 2101(b)	2

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

Civil Action No. 7694

RISS & COMPANY, INC.,

Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendants

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, AND OTHER CLASS I RAILROADS,

Interveners

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiff-appellant, Riss & Company, Inc., submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment and decree of the District Court entered in this cause.

Opinion Below

The opinion of the District Court for the Western District of Missouri has not yet been reported. A copy of the per curiam opinion of the District Court containing the findings of fact, conclusions of law and judgment and a copy of the final decree are attached hereto as Appendix A.

Jurisdiction

The judgment of the District Court was entered on May 7, 1953. A motion for new trial was filed May 15, 1953 and denied by order of the District Court on July 7, 1953. A petition for appeal is presented to the District Court herewith, to-wit, on August 24, 1953. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515; *American Trucking Associations* v. *United States*, 326 U. S. 77; *United States* v. *Detroit and Cleveland Navigation Company*, 326 U. S. 236.

Questions Involved

1. Where the Interstate Commerce Commission has authority to issue an order only under Section 204(c) of the Interstate Commerce Act, may the order be sustained upon judicial review by attributing to the administrative proceeding compliance with Section 204(c) and with the Commission's Rules of Practice relating thereto although the Commission specifically refused to comply with those requirements in the administrative proceeding.

2. Whether the Interstate Commerce Commission may refuse a motor carrier an opportunity for hearing under Section 204(c) of the Interstate Commerce Act because the Commission believes the materials in its files sustain a petition for cease and desist order filed by competing carriers.[1]

---

[1] All the points raised in the Assignment of Errors are also presented. The questions presented stated above set forth the major issues.

BLEED THROUGH POOR COPY

Statutes Involved

Section 204(c) (49 U. S. C. § 304(c)) of the Interstate Commerce Act, as amended, and Sections 5, 7 and 10(e) (5 U. S. C. §§ 1004, 1006, 1009(e)) of the Administrative Procedure Act are set forth in Appendix B hereto.

Statement

Appellant, hereinafter referred to as Riss, is a common carrier by motor vehicle holding operating authority issued by the Interstate Commerce Commission (Commission). Riss brought this action to suspend, set aside and permanently enjoin orders of the Commission dated June 2, 1952 and July 14, 1952 requiring Riss to cease and desist transporting dangerous explosives under Riss' authority in Docket No. MC-200 (Sub-No. 60 TA) beyond the scope of the operations specified in an appendix to the report accompanying the order dated June 2, 1952.

On February 26, 1952 the Eastern Railroads and Class I Railroads in Western Territory, interveners in this case, hereinafter referred to as the Railroads, filed a document with the Commission entitled "Docket No. MC-200 Sub 60 TA, Petition for Issuance of a Cease and Desist Order." Riss filed a motion to dismiss and answer to the Railroads' petition on April 1, 1952, urging in support of the motion that the cease and desist order sought by the Railroads could be issued by the Commission, if at all, only in formal complaint proceedings.

The Commission on a six to three vote issued its order dated June 2, 1952, without further proceedings and without affording an opportunity for hearing. The Commission denied Riss' motion to dismiss, holding that the Railroads' allegations and requested relief could be granted on petition, under Rule 102 of the Commission's General Rules of

Practice covering requests for relief not otherwise provided for in the Rules of Practice.

On June 30, 1952 Riss filed a petition for reconsideration and vacation of the order dated June 2, 1952 and again requested notice and an opportunity for hearing on the issues raised by the Railroads. The Railroads filed a reply to Riss' petition on July 9, 1952. The Commission denied the Riss petition by order dated July 14, 1952.

Riss filed its complaint in the United States District Court for the Western District of Missouri, Western Division, on July 18, 1952. The United States and the Commission filed answers to the complaint. The Railroads intervened in the action and also filed an answer to the complaint.[2] A hearing was held before the District Court on November 12, 1952. There was introduced at this hearing as evidence copies of the orders sought to be reviewed and the docket of the Commission in MC-200 (Sub 60 TA) as well as certain prior operating authorities. In its complaint and at oral argument before the District Court Riss contended that the Commission had statutory authority to issue the orders under review only under Section 204(c) of the Interstate Commerce Act which, in terms, required that notice and opportunity for hearing be afforded and that the orders were void because the Commission had refused to afford Riss notice and hearing. Riss argued that the action of the Commission violated the terms of Section 204(c) of the Interstate Commerce Act and Sections 5, 7 and 8 of the Administrative Procedure Act pertaining to administrative hearings. Riss also argued that the procedure adopted by the Commission in this case violated the

[2] The Railroads' petition filed with the Commission was filed on behalf of Eastern Railroads and Class I Railroads in Western Territory. The intervention in the case was on behalf of some sixty-two rail carriers described in the motion for leave to intervene as "substantially all of the Class I Railroads in the United States. . . ."

BLEED THROUGH POOR COPY

Commission's General Rules of Practice and the Commission's established procedure in such cases, noting that the Commission had never previously entered orders of this type without proper notice and hearing in a formal complaint proceeding. The United States, the Commission and the Railroads urged that Section 204(c) of the Interstate Commerce Act did not apply and that the Commission's orders were proper, although entered without formal hearing.

The District Court, on May 7, 1953, issued its per curiam opinion and its final judgment and decree dismissing Riss' complaint. A motion for new trial was filed May 15, 1953 and denied by the District Court July 7, 1953. The Court in its per curiam opinion found that the Commission had statutory authority to issue the cease and desist order here involved only under Section 204(c) of the Interstate Commerce Act which in terms required notice and hearing. The District Court also held that the Railroads could invoke the Commission's statutory authority under Section 204(c) only by the filing of a "complaint" and that the Commission could not entertain the petition of the Railroads under the Commission's General Rule of Practice No. 102 since other Rules covered the filing of complaints. The Court, noting that the Commission had refused to treat the Railroads' petition as a complaint, nevertheless, held that the Railroads' petition was in the Court's opinion a sufficient complaint under the Commission's General Rules of Practice. The Court also concluded that, since a copy of the petition had been mailed to Riss, the notice required by Section 204(c) of the Interstate Commerce Act was satisfied. The Court further concluded that the Railroads' petition and the motion to dismiss and answer filed by Riss constituted an adequate hearing.

The Court held, however, that it could not review the

findings and orders of the Commission because Riss had not brought to the Court enough of the record before the Commission, in particular a certificate issued to Riss in another Commission docket in 1950. The Court held that the record before the Commission consisted of matters of which the Commission had taken official notice and matters contained in the petition of the Railroads and motion to dismiss and answer of Riss. The Court held that all of the matters considered essential had been identified by the Commission in its report and order. The Court held that, although the record consisted largely of matters of which the Commission had taken official notice, these matters must be introduced in evidence by Riss in the District Court. The Court concluded it could not take judicial notice of such matters, including the certificate issued to Riss, necessary to judicial review of the order. The Court on this basis found that Riss had not sustained its burden of proof and dismissed the complaint.

The Questions Involved Are Substantial

The District Court revamped the entire proceeding before the Commission in order to sustain the Commission orders here involved. The District Court found that affirmative orders such as involved in this case requiring a motor carrier to cease and desist conducting operations because unlawful could be entered by the Commission only under Section 204(c) of the Interstate Commerce Act. Section 204(c) in terms provides that such an order may be issued by the Commission only upon the filing of a complaint and after notice and hearings. Having concluded that the Commission was required to comply with Section 204(c) if the orders were to be valid, the District Court: (1) found the petition of the Railroads was a "sufficient" complaint under Section 204(c) although Riss' motion to dismiss because it

BLEED THROUGH POOR COPY

was not a complaint had been denied by the Commission on the ground that it was a proper petition under Rule 102 of the Commission's General Rules of Practice; (2) found that Riss had notice of the complaint since a copy of the Railroad petition (which the Court, but none of the parties before the Commission, construed to be a complaint) had been mailed to Riss; (3) found that Riss had been accorded a hearing although the Commission had consistently denied the request of Riss for an opportunity to introduce evidence on the issues at a hearing and denied to Riss any opportunity to examine and rebut any evidence offered by the Railroads; (4) found that the record of the hearing consisted of all matters considered essential by the Commission which were identified in the report or orders of the Commission. The District Court, having thus clothed what the Commission held to be a petition proceeding with all the attributes of a formal complaint, notice, hearing and a record, concluded that its consideration of the merits of the order was halted at the threshold because Riss had not introduced in the evidence before the Court vital parts of the "record" before the Commission. Thus, the District Court held that it could not take judicial notice of a certificate issued to Riss and to which reference was made by all parties in the District Court although the Court also found that the Commission could and did take official notice of the certificate.

The issues presented by this appeal are of importance not only to Riss but to the entire motor carrier industry and to the administration of the Interstate Commerce Act. The decision of the District Court makes adherence by the Commission to the provisions of the Act and its published Rules of Practice almost discretionary. The Commission is to be free to act in any manner it chooses confident that the reviewing court will reconstruct the administrative pro-

ceeding to conform to the applicable requirements and statutory authority. This reduces a proceeding before the Commission to hopeless confusion. It is impossible to know the basis for the Commission's action because it may be changed by the reviewing court. Hearings may be conducted wholly upon official notice and opportunity to present evidence denied because it is concluded that the unheard evidence either is not relevant or could not affect the result. The Commission may, as here, drastically restrict the service which may be performed by a motor carrier solely on the basis of a petition and without a hearing. It is submitted that this is not only novel in the decisions and action of the Commission; this is a novel concept of administrative law.

1. The District Court plainly erred in failing to set aside the orders of the Commission upon finding that such orders could have been entered only upon complaint and after notice and hearing under Section 204(c) of the Interstate Commerce Act, 49 U. S. C. § 304(c), and upon finding that the Commission and the parties did not consider the proceeding before it as being upon complaint. The primary issue before the Court was whether the orders could be entered only under Section 204(c) or whether the orders could be entered under other provisions of the Act. It was never contended by any party before the Commission or before the Court that the Railroads' petition was a complaint. Counsel who represented the Railroads before the Commission made apparent the parties' understanding of the nature of the Commission proceeding when he stated to the District Court (Tr. p. 61):

> This is not a complaint proceeding. The Commission has no complaint before it and whatever the provisions of Section 204(c) relating to a hearing are they don't apply to this case.

BLEED THROUGH POOR COPY

The District Court, however, after finding a complaint required, concluded that the Railroads' " 'petition' is a sufficient *Complaint* within Section 204(c) and the Commission's General Rules of Practice governing complaints."

The District Court's conclusion squarely contradicts the determination by the Commission, noted by the Court, that it was acting under its Rule 102, which provides a remedy on petition when not otherwise provided for in its Rules, and not under its Rules governing complaints. Had the Commission in fact concluded, as Riss requested in its motion to dismiss and as the District Court held, that the issues raised by the Railroads were appropriate only upon complaint, the Commission then would have been compelled to grant Riss' motion to dismiss. The Court, therefore, in finding that the Railroads' petition and the Commission's proceeding complied with Section 204(c) of the Act and the Commission's General Rules of Practice governing complaints has substituted its judgment for that of the Commission. The District Court erroneously concluded not to review the orders on the basis on which they were in fact made but upon wholly new and different concepts of what the Commission might have done. Compare *Securities & Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80 (1943). The District Court's opinion moreover has created a method by a process of judicial conversion by which the Commission may enter findings and compel a motor carrier to cease and desist operations without reference to the requirements of the statute under which the Commission must act.

2. The District Court erred in finding that the mailing of a copy of the Railroads' petition to Riss constituted notice of a complaint under Section 204(c) of the Interstate Commerce Act, 49 U. S. C. § 304(c). Neither the Railroads, Riss, nor the Commission ever considered the petition as a

complaint. The Commission's denial of Riss' motion to dismiss the petition makes that clear. The Court, however, by determining for the first time that the Railroads' petition "is a sufficient complaint," found that service of that petition constituted notice to Riss of a complaint. The function of notice is to apprise the parties of the issues involved and of the type of proceeding in which those issues are to be tried. Section 5(a) of the Administrative Procedure Act, 5 U. S. C. § 1004(a), provides in part:

> Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted.

Riss was never apprized of the time, place or nature of the hearing or that a hearing was being conducted under Section 204(c) of the Interstate Commerce Act or under the Commission's General Rules of Practice governing complaints. On the contrary, all of the parties understood that there would be no hearing before the Commission because the Commission did not deem Section 204(c) of the Act applicable. The Court's reconstruction of the proceedings by the District Court in order to find notice had been given to Riss violated Section 5(a) of the Administrative Procedure Act.

3. The District Court erroneously found that the Railroads' petition and Riss' motion to dismiss and answer supplemented by official notice by the Commission of applications for certificates, proceedings before the Commission in relation thereto, and orders of the Commission thereon constituted an adequate hearing under Section 204(c) of the Interstate Commerce Act, 49 U. S. C. § 304(c). Riss was entitled to a hearing at which it would know the evidence submitted and to be considered. Riss was entitled to an

BLEED THROUGH POOR COPY

opportunity to cross-examine witnesses, to inspect materials relied upon by the Railroads and to offer its own evidence in rebuttal or explanation. The Supreme Court has consistently held that these are the basic requisites of a fair hearing. *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88. Riss was denied such a hearing although Riss specifically requested a hearing before the Commission. Moreover, the Supreme Court has stated that the Commission cannot by the use of the implement of official notice deprive the parties of a fair hearing. *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515. The Commission cannot take official notice of matters in its files which were not presented at a hearing and which, therefore, Riss had no opportunity to explain or rebut. *United States* v. *Abilene & S. R. Co.*, 265 U. S. 274. Section 7(d) of the Administrative Procedure Act, 5 U. S. C. § 1006(d), provides that an administrative agency must afford a party an opportunity to rebut when an agency's decision rests on official notice.

The extent to which the substitution of official notice for a full and fair hearing deprives the parties of testing the Commission's findings upon judicial review is amply illustrated in this case. None of the parties knew what facts and proceedings the Commission had considered in reaching its conclusions beyond the meager statement in the report of the Commission. In this respect it is significant to note that the District Court's summary of the facts relating to the operating authority involved is far more specific and detailed than the Commission's. The parties did not know if the Commission had considered and relied upon materials from its files beyond those specifically mentioned in the report or whether on the contrary it had rejected as immaterial everything except those specifically set out in the report. This produced the novel situation in the District

Court of the defendants arguing that letters, orders, dockets and other papers culled from any and all files of the Commission supported the Commission's order although the materials were not mentioned in the report of the Commission. Neither the parties nor the District Court could state with certainty the full extent of the facts upon which the Commission had or had not considered.

Further, it is conceded that the report of the Commission contained findings which could not be supported on any basis. The Commission stated in its report of June 2, 1952 that although the Defense Department was aware of the filing of the Railroads' petition, that Department had not intervened in the proceeding. The counsel for the Commission conceded in the hearing before the District Court that there was nothing in the record to support the Commission's statement (Tr. p. 73). The lack of a record of a hearing precluded effective judicial review because it was impossible to ascertain with any degree of certainty the basis for the findings and action of the Commission.

It is important to note that this case is the first in which the Commission has entered a cease and desist order compelling a motor carrier to restrict its operations without a full hearing upon a complaint. The Commission has consistently with this single exception afforded opportunity for full hearing upon such complaints even though the only controverted issue was the proper interpretation of the terms of the authority. *Akers Motor Lines, Inc.* v. *Malone Freight Lines, Inc.*, 53 M. C. C. 353; sustained sub nom. *Malone Freight Lines, Inc.* v. *United States*, 107 F. Supp. 946, (D. C. N. D. Ala., 1952); aff'd 344 U. S. 925, (No. 505 October Term, 1952).

4. The District Court erred in refusing to review the Commission's findings and orders. This conclusion leaves Riss without any forum in which the scope of its operating

authority may be determined on the merits. The District Court found that Riss had not introduced in evidence enough of the "record" before the Commission to enable the Court to review the Commission's findings and orders. Specifically, the Court held that the absence of a certificate of public convenience and necessity issued to Riss in Docket No. MC-200 (Sub-No. 46) on February 21, 1950 precluded such review. This was clearly in error. The Commission's interpretation of Riss' operating authority in Docket No. MC-200 (Sub-No. 60 TA) turned on whether the Commission had properly limited Riss' authority in Docket No. MC-200 (Sub-No. 60 TA) to the scope of the certificate in Docket No. MC-200 (Sub-No. 46) or whether Riss' authority in Docket No. MC-200 (Sub-No. 60 TA) was broader than the certificate in Docket No. MC-200 (Sub-No. 46). The precise language of the certificate in Docket No. MC-200 (Sub-No. 46) was irrelevant to the determination of these questions. The Commission, as the Court noted, appended to its report of June 2, 1952, which was in evidence before the District Court, the complete description of the points and places and the manner of performing service specified in the certificate issued in Docket No. MC-200 (Sub-No. 46). There was, therefore, no barrier to the Court's review of the orders. Nevertheless, the Court refused to review the orders and further refused to afford Riss a new trial at which it could present the certificate in order to obtain judicial review.

If the District Court's refusal to review the findings and orders of the Commission is sustained, Riss will forever be precluded from having a determination of the scope of its operating authority upon the merits. *Interstate Commerce Commission* v. *Southwest Freight Lines*, 86 F. Supp. 587 (D. C. W. D. Mo. W. D., 1949); *Interstate Commerce Commission* v. *G & M Motor Transfer Co., Inc.*, 64 F. Supp. 302 (D. C. W. D. N. Car., 1945). Riss firmly believes that the

action of the Commission, drastically restricting Riss' authority to transport dangerous explosives, was improper. Riss believes that if it were afforded a proper hearing and an opportunity to establish its case of record, the Commission would make findings in Riss' favor or the Commission's findings would not be sustained on review.

We believe the questions presented by this appeal are substantial and that they are of importance to all motor carriers subject to the Interstate Commerce Act.

Respectfully submitted,

JOHN B. GAGE,
A. ALVIS LAYNE, JR.,
JOHN H. KREAMER,
H. CHARLES EPHRAIM,
Counsel for Plaintiff-Appellant.

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

Civil No. 7694

RISS & COMPANY, INC.,

Plaintiff,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants,

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, and Other Class I Railroads,

Interveners

PER CURIAM:

Riss and Company, Inc. is an extensive motor carrier operating under various certificates bearing the general Commission docket number designation of MC-200. Among such certificates is MC-200 (Sub. No. 60TA), which is a temporary certificate to transport "*Dangerous Explosives,* * * *." A number of railroads filed (February 27, 1952), with the Commission, a "Petition for Issuance of a Cease and Desist Order" against Riss to cease and desist from operating "beyond the scope of the territory authorized in Sub 60TA * * *" and "* * * to confine its operations under Sub 60 TA to the routes and points authorized in the certificate issued Riss and Company under MC 200 Sub 46 dated February 21, 1950." To this petition, Riss filed an answer which included a motion to dismiss the petition. Without further hearing on the petition and the answer, the Commission filed its report and entered its order (on June 2, 1952), that Riss cease and desist "on or before July 10, 1952" from transportation of dangerous explosives under MC-200 (Sub-No. 60TA) "beyond the scope of the operations specifically described in the appendix to the said report * * *" (64 M. C. S. 531). Riss filed a petition to "reconsider and vacate" this order. Railway petitioners

filed reply to this petition to reconsider. On July 14, 1952, the petition to reconsider was denied without further hearing. This proceeding is to review these Commission orders of June 2, 1952 and July 14, 1952.

Here plaintiff, in contending that these two orders of the Commision are erroneous, states its position (of course, as to the order of June 2, 1952) as follows:

> "* * * erroneous and void as a matter of law and is arbitrary and capricious and without foundation either in fact or in law because: (1) the findings of fact and conclusions and orders were entered without notice and hearing in violation of the provisions of Part II of the Interstate Commerce Act, 5 U. S. C. § 1000 *et seq.*, although notice and hearing was requested by plaintiff; (2) the operating authority in Docket Number MC-200 (Sub-No. 60TA), initially granted in 1942, continues in full force and effect by virtue of other orders of the Commission and Section 9(b) of the Administrative Procedure Act, 5 U. S. C. § 1008(b); and (3) the Commission has, without good cause, appearing, restricted the operating rights granted, solely on grounds of interpretation, contrary to the terms and provisions of the operating authority granted."

The Commission contends that this proceeding was solely one to interpret the scope of temporary certificate Sub-No. 60TA: that the proceeding before it was "upon a petition, not a complaint," therefore the report and order are based on Sec's. 204(6), 210a(c) "and numerous judicial decisions construing Commission authority to interpret authority issued by it" and *not* under Sec's. 204(c) or 212(a); that the report findings and the order are based solely upon Commission official records and no other evidence was "required or necessary" to its interpretation; that a "formal hearing" is required only where facts, provable by other than its official records, are reasonably necessary for interpretation of operating authority.

The United States contends that plaintiff received adequate notice; and that, though not required to grant a hearing, the Commission did so giving plaintiff every oppor-

tunity to present every contention, of fact or law, it desired in opposition to the petition of the railroads.

The intervening railroads contend that Section 210a(a), giving power to the Commission to grant temporary certificates "without hearings or other proceedings", inherently includes power to interpret the scope of such grant without "hearings or other proceedings"; that the duty of the Commission, under Section 204(a)(6), "to administer, execute and enforce all provisions of this part, to make all necessary orders in connection therewith" necessarily includes power to interpret the meaning of its temporary grants and to enforce such interpretation; that the only *fact* issue raised by interveners' petition was that of transgression by Riss of its granted authority under Sub 60TA and, which issue was removed from dispute by admissions of Riss in its answer to interveners' petition; that there is no showing that the interpretation of Sub 60TA by the Commission is erroneous, arbitrary, capricious and without foundation.

I. Issue as to Notice and Hearing

The proceeding before the Commission was one, by the Railroads, to secure relief from injury they allege resulted from operation by Riss beyond the scope of the temporary certificate Sub 60TA. The relief sought was that the Commission "require Riss to confine its operations under Sub 60 TA to the routes and points authorized in the certificate issued Riss & Company under MC-200 Sub 46 dated February 21, 1950".[1] This proceeding required the determination of two matters: the scope of lawful operations by Riss under Sub 60TA and whether Riss was exceeding such lawful scope. The scope of such lawful operations was a matter of interpretation of the extent and terms of Sub 60TA—*in the situation here*, this would seem to be a question of law. Whether Riss was exceeding its authority was a purely factual matter of what it was doing measured by what it had authority to do. Although this "petition" before the Commission was made up of these two elements, the petition is

[1] The certificate issued on February 21, 1950 defined the "grandfather" rights as to general commodities (not including explosives).

a unit when we come to the question of the power of the Commission to consider and act upon it.

The Commission has the power to interpret the meaning of a motor carrier certificate issued by it. Such is a necessary power to enable it to perform its duties under Section 204(a)(6) of the Act. The Commission can exercise this power even though it does so in a proceeding which seeks only a declaratory order construing a certificate.[2] But where such interpretation is an integral part of a pleading before the Commission which prays positive action therein by the Commission based upon such interpretation, we should treat the pleading as a unit.

Treating the so-called "petition" as a unit, it is nothing more nor less than a "complaint" within the meaning of Section 204(c) of the Act. That section sets forth the only method by which the Commission can, by its own action, "compel" compliance with the provisions of the Act or the requirements of the Commission thereunder, without resort to the Courts under Sections 222(a) or 222(b).[3] This "petition" is the kind of thing meant by "complaint" as used in 204(c).

Treating the "petition" of the Railroads as a complaint within the meaning of Section 204(c), we are met by the contentions of Riss (raised in its answer and motion to dismiss before the Commission) that the "petition" does not comply with the Rules of the Commission setting out the requirements for "complaints" and that, if the matters urged in the "petition" are proper for complaint proceedings, Rule 102 is not applicable.

The Commission regarded this proceeding as being under its Rule 102, which is one of its adopted General Rules of Practice, regulating procedures before it. Rule 102 is a catch-all providing a remedy where no other Rule does so. Since there are other Rules governing "complaints" and since this "petition" is, in essence, a "complaint", those

---

[2] Carroll Trucking Company Interpretation of Certificate, 52 M.C.C. 664.

[3] We are not impressed by the contention that a *temporary* certificate is not within Section 204(c) as fully as a permanent certificate.

BLEED THROUGH POOR COPY

Rules and not Rule 102 applies here. Thus this issue as to the Rules resolves into whether this "petition" meets the Rules requirements governing "complaints". Plaintiff sets forth (Appendix B of its main brief) what it states are all of the Rules governing "complaints" pertinent here. Accepting this unchallenged statement, this "petition" sufficiently complies therewith to overcome this objection by plaintiff. We conclude that this "petition" is a sufficient *complaint* within Section 204(c) and the Commission's General Rules of Practice governing complaints.

Another contention of plaintiff is that a "cease and desist" order cannot be made by the Commission where the effect thereof would be to deny Riss the right (in an action against Riss under Section 222(a) or 222(b) to place in issue the scope of the certificate; and that such effect results where the Commission, prior to an action under 222(a) or 222(b), has ruled on the legality of the particular operations. The force of this position is, that unless Riss is given the notice and granted the hearing accorded by Section 204(c),[4] plaintiff will be denied opportunity to challenge the interpretation of Sub 60TA as made by the Commission in a Judicial proceeding against it. This position is sound (Southwest Freight Lines v. I. C. C., 8 Cir., 184 F. 2d 149, 151; I. C. C. v. G & M Motor Transfer Co., 64 F. Supp. 302, 303; I. C. C. v. Consolidated Freightways, Inc., 41 F. Supp. 651, 655). This is the legal doctrine that orders of the Commission are not subject to "collateral" attack in Judicial proceedings but must be tested Judicially in direct review of such orders. Such reviews are provided for, in the Act, only by Section 204(c). That section provides for *complaints* before the Commission which must, by it, be considered and determined *upon due notice and proper hearing*. Therefore, the validity of these orders depends upon whether the "notice and hearing", required by Section 204(c), was accorded by the Commission in this proceeding which resulted in the cease and desist order.

(a) *Notice.* The record here shows service on Riss of a copy of the Railroads' petition on February 26, 1952 (Exh.

[4] See also 49 U.S.C.A. Section 17 (9).

20, p. 117). Riss sought and obtained extension of time, until April 1, to answer (Exh. 20, p. 164). Riss filed answer and motion to dismiss on April 1 (Exh. 20, p. 89). There is no merit in the contention that Riss did not have proper and sufficient notice.

(b) *Hearing.* It is contended that plaintiff did not ask for a hearing before the Commission. This does not matter. Section 204(c) requires a hearing as a basis for Commission action upon a complaint. Even if such hearing might be waived (which we do not determine) yet there would have to be clear showing of waiver of such an important right. Here, the answer and motion of Riss, before the Commission, do not present such showing. The Petition for Reconsideration filed by Riss with the Commission emphatically denies any waiver and insists upon the right of a hearing (Exh. 20, p. 81).

We think the situation here created before the Commission brought the proceedings before it within Section 204(c) requiring the "hearing" prescribed by that section.[5]

We have been cited no determination of the Commission based upon its construction of a certificate and resulting in an order against the certificated carrier where the Commission did not accord a hearing in respect to such construction by it.

The United States contends that "although the Commission was not required to grant a hearing, it did so, and plaintiff was given every opportunity to present every contention, either in fact or in law, in opposition to the railroads' petition" (Br. pp. 4-5). Also the intervening railroads contend that, even if Section 204(c) be applicable (which they deny), yet the requirement for a hearing thereunder "was fully satisfied by the state of the record" (Br. p. 34).

This "hearing" was made up of the pleadings before the Commission alone. The report and order of the Com-

---

[5] Apparently, the Commission has heretofore usually accorded hearings even where the issue before it was solely the interpretation of the meaning of a certificate issued to a motor carrier under the Act and no other relief was sought. *Carroll Trucking Company Interpretation of Certificate*, 52 M.C.C. 178, 54 M.C.C. 664.

mission of June 2, 1952, were made without further or other appearances of the parties beyond these pleadings and without opportunity to offer evidence. These pleadings set out the contentions of the parties. Baldly stated, the main contention was whether Riss was operating beyond the territorial limitations of its temporary permit to transport explosives under certificate MC-200 (Sub-No. 60TA). Resolution of this main issue depended upon determination of two matters: the limits of authority under Sub-60TA; and what operations Riss was actually carrying on in the transportation of explosives.

What Riss was actually doing as to such transportation is obviously a question of fact. We think this matter is not a disputed fact. In its answer to the petition before the Commission (Exh. 20, p. 99), Riss states:

> "During the course of the proceedings in Sub-No. 84 which have lasted over four years, Riss has shown extensive operations under Sub-No. 60TA which the railroads now claim to have been illegal. Riss, to petitioners' (railroads) knowledge, has been operating its temporary authority in Sub-No. 60TA for almost six years and now for the first time the railroads question the propriety of these operations."

We think these quoted statements are direct admissions that the actual operations of Riss are those which the railroads declare are beyond the limits of Sub-No. 60TA as they construe such limits and which Riss asserts are within such limits as it construes them. This removed this matter of fact as an issue before the Commission.[6]

The remaining issue before the Commission was the interpretation of the territorial limits of its Sub-No. 60TA. Such character of issue may be one of law [7] or one of mixed law and fact [8] depending upon the particular situation.

---

[6] The endeavor of Riss to weaken the meaning of this admission (Reply Brief, p. 14, note 10) is not convincing.

[7] *Interstate Common Carrier Council of Maryland, Inc. et al.* v. *United States et al. (Md.)*, 84 F. Supp. 414, 420, aff. per cur., 338 U.S. 843, 54 M.C.C. 664.

[8] *Carroll Trucking Company Interpretation of Certificate*, 52 M.C.C. 178.

Here, we think it is one of law. No disputed *facts* seem to be involved or necessary to be resolved.[9]

The issue and the pertinent situation seem clear. The issue is whether the territorial limits of Sub-No. 60TA for transportation of explosives are the same as defined in a permanent certificate granted Riss in Sub-No. 46 for the transportation of other Commodities.

As shown by the evidence introduced *in this Court*, the situation is as follows as to various pertinent proceedings before the Commission. Riss (in 1942) purchased (with Commission approval) the rights of another carrier, Monark, which was operating under a temporary "grandfather" certificate (docketed as MC-30077) with certain Sub-numbers—one of which, Sub-No. 6 TA, applied to transportation of explosives.[10]

There followed extensive proceedings before the Commission and in the Courts (Riss & Co., Inc. v. United States et al., 100 F. Supp. 468, aff. per cur. 342 U. S. 937, rehearing den. 343 U. S. 937) as to the rights acquired from Monark on the "grandfather" claims asserted under MC-200 Sub-No. 46 for transportation of *commodities generally*. The permanent certificate covering Sub-No. 46 was issued on February 21, 1950. It did not allow all of the operations claimed under the temporary certificates.

While the just described proceedings as to Sub-No. 46 were in progress, there were other proceedings, respecting transportation of explosives, going on. February 25, 1942, Monark had been granted temporary certificate (Exh. 7a) to transport explosives and ordnance supplies "To, from and/or between points and places now served by applicant as set forth in * * * MC-30077 and Sub-Nos. 1 to 5 inclusive. This certificate was for 180 days and was given Sub

---

[9] When we speak of "facts" in this connection, we exclude such matters as applications for certificates, proceedings before the Commission in relation thereto, and orders of the Commission thereon. In a sense, all of such matters are facts which are parts of the record made by the Commission at a hearing—whether by formal introduction or by official notice.

[10] The general docket number of Riss was MC-200. Upon its purchase of Monark rights, these rights were docketed under Riss MC-200—the commodity rights being designated as "Sub-No. 46."

No. 6TA under MC-30077. This certificate was renewed on April 9, 1942, for 180 days (Exh. 8) expiring October 6, 1942 (see Exh. 9 p. 2, footnote 4). September 28, 1942, Riss was authorized to purchase Monark and its operating rights (specifically naming Sub-No. 6TA).

October 3, 1942, Riss filed application to transport "Dangerous Explosives and Ordnance Supplies To, from and/or between points and places now served by applicant as set forth in certificates issued by and applications pending with the Interstate Commerce Commission under Dockets MC 30077 and Sub Nos. 1 to 5 inclusive, Monark Freight System, Inc. * * * purchased by Riss & Company, Inc. * * * ". This application set forth acquisition by Riss of MC-30077 Sub-No. 6TA, expiration thereof on October 6, 1942 and sought continuance of "the present temporary authority in effect until December 31, 1944" (see Exh. 3 attached to application). This application was docketed under MC-200 as Sub-No. 45TA. This application being for "an extension of operation" had attached a map (Exh. 2 thereto) showing the existing Riss Authority and also the extension from Monark. This application is Exhibit 10 here. November, 1942, a temporary certificate was issued Riss until Decemer 31, 1944 (Exh. 11). This certificate was extended until December 31, 1945 by general order (Exh. 18, pp. 20-21). Further until March 1, 1946 by general order (Exh. 18, pp. 36-37).

March 1, 1946, Riss applied to transport "Explosives and U. S. Army Ordnance Stores" over "regular" routes "between points named in I. C. C. Order of February 3, 1945 in * * * MC-200, Sub 46 (formerly Monark Motor Freight System Docket MC 30077)" until June 30, 1946 (Exh. 13). Certificate was granted April 15, 1946 until June 30, 1946 for transportation of "*Dangerous Explosives,* To, from and/or between points and places authorized to be served in connection with Docket Nos. MC 30077 and effective sub numbers thereunder which were acquired by applicant herein" (Exh. 16). This proceeding was given Docket No. MC-200 Sub 60TA. This certificate was extended (by general order) until March 31, 1947 (Exh. 20, pp. 133-4). March 28, 1947, this certificate was extended until September 27,

1947 (Exh. 20, p. 121). September 30, 1947, certificate Sub-No. 60TA (along with other Sub-Nos. of Riss) was extended until "finally determined" in MC-200 Sub-No. 84 (Exh. 21).

August 22, 1947, Riss filed an application for permanent authority covering several of its ten temporary certificates, including Sub-No. 60TA. This application was given docket number MC-200 Sub-No. 84. After extended hearings, orders were entered denying the application. A judgment of this Court sustaining this order (96 F. Supp. 452) was reversed (per curiam) by the Supreme Court (341 U. S. 907) for failure to observe proper administrative procedure. Promptly thereafter (April 26, 1951), the Commission set aside all proceedings in Sub-No. 84 and ordered all temporary authorities involved therein to be continued in force until final determination of Sub-No. 84 unless terminated earlier for good cause. Since then, there have been extensive hearings in Sub-No. 84.

The foregoing has set out the issue and the situation as to which that issue is to be determined. To summarize: The issue was whether the Riss authority to transport explosives under Sub-No. 60TA was territorially defined in the permanent certificate issued Riss in Sub-No. 46. Apparently, the Commission determined this issue from its own records, made up of applications and of orders granting the temporary and permanent certificate proceedings as to Sub-No. 46 and the temporary certificates as to transportation of explosives—which latter had eventually resulted in temporary certificate Sub-No. 60TA.

In the proceedings before the Commission, the petition of the railroads expressly identified the applications and orders of the Commission upon which they rely for their interpretation of the meaning— as to territorial operation —of Riss under Sub-No. 60TA. In its answer and Motion to Dismiss, Riss brings in one additional proceeding, namely Sub-No. 84. Apparently, the applications and orders named in these pleadings were all which the parties (railroads and Riss) thought bore upon the interpretation of Sub-No. 60TA.

How far an administrative body—such as this Commission—can take "official notice" of its own records, proceed-

ings and orders is not at all clear but it does have that power to some extent.[11] It would seem that this power would extend, at least, to "notice" of such orders and applications therefor as have been directly drawn to its attention in pleadings before it; which are parts of the historical development of the immediate issues before it; and which relate directly to the rights of a party to such issues. This should be particularly true where the issue is one purely of law and where reference to earlier acts of the Commission is solely to aid in resolving such issue. Here the earlier applications and orders which were considered pertinent and determinative by the Commission are identified in its Report and its Order of June 2, 1952. From the Report and this Order the Commission makes clear what it considered in reaching its decision. Such is the situation here.

Not only did the parties direct the attention of the Commission to the particular prior proceeding pertinent to the interpretation of Sub-No. 60TA but each side (in its pleadings) presented its views and written arguments for the interpretation it deemed correct. The only thing lacking was oral argument. As to that, no *specific* request for "oral" argument was ever asked. What Riss sought was an entire hearing (which normally would include oral argument). We conclude that the requirement of an adequate hearing before the Commission has been met.

II. Issue of Continued Authority of Sub-No. 60TA

Plaintiff contends that the operating authority under temporary Sub-No. 60TA continues "in full force and effect by virtue of other orders of the Commission and Section 9(b) of the Administrative Procedure Act, 5 U. S. C. § 1008(b)."

We are unable to agree that plaintiff has here established that the Commission failed to consider any of its orders pertinent to its decision. The temporary authority under Sub-No. 60TA was expressly related to and dependent upon temporary Sub-No. 46. Both of those temporary author-

---

[11] *United States et al.* v. *Pierce Auto Freight Lines, Inc. et al.*, 327 U.S. 515, 529-530.

ities as well as the permanent certificate Sub-No. 46 were considered by the Commission. Also, were the various extensions of Sub-No. 60TA, including that in Sub-No. 84.[12]

We are unable to agree that plaintiff has established any violation of or departure from Section 9(b) of the Administrative Procedure Act.

III. Issue of Restrictive Interpretation

This contention by plaintiff has two prongs. First, is the broad position that the interpretation of the Commission is basically wrong because the authority under Sub-No. 60TA is not limited by the territorial restrictions in permanent certificate Sub-No. 46 but includes all points which it claimed to serve as successor in interest to the Monark "grandfather" rights as well as to all points covered by certain certificates formerly held by Monark in subnumbered proceedings. The second is that, even if limited by

---

[12] Commissioner Mahaffie (joined by Commissioners Lee and Knudson) dissented here on grounds stated as follows:

> "Applicant's temporary authority was by an order dated September 30, 1947, continued so as to expire upon final determination of its application for permanent operating rights in No. MC-200 (Sub-No. 84). No. MC-200 (Sub-No. 84) has been heard at length. In the meantime, extensive operations under the outstanding temporary authority are being conducted. We may find that they should be continued or be curtailed. But until we do on the basis of the record now available to us we should not grant such a petition as this, unless it is required by law. As to the law applicable in the circumstances, I think the provisions of section 9(b) of the Administrative procedure Act on which the present order is based may still be considered controlling."

Whether it might have been advisable for the Commisison to decline determination of this matter until it had acted upon a permanent certificate in the proceeding under Sub-No. 84, was, we think, a matter of discretion on the part of the Commission and not a question of power under Section 9(b) of the Administrative Procedure Act. Surely, it is not the law that the Commission cannot, after due notice and hearing, determine and prevent violation of a temporary certificate authority whenever such violation is brought to its attention by a proper complaint, as here.

Moreover, the Report states (p. 534):

> "If there is a need for additional transportation service, it may be met by the filing of further properly supported applications for temporary or permanent authority."

BLEED THROUGH POOR COPY

the points in permanent Sub-No. 46, yet the Commission has further circumscribed its operations to less than those limits.

Our consideration of these two contentions is halted, at the threshold, by the state of the record upon which our determination must be based.

Our immediate concern is whether the "record" made before this Court is legally sufficient to present to us the "record" which was before the Commission and was the basis for its Order of June 2, 1952. We think this *sufficiency* depends upon three successive steps: (1) is it clearly ascertainable from the Order of June 2 and the accompanying Report just what matters the Commission considered; (2) are such matters capable of being presented to this Court as being the record which was considered by the Commission; and (3) has enough of this record before the Commission been brought to this Court to enable us to decide the issues here.

(1) All of the matters considered essential by the Commission are clearly identified either in the Order or in the Report. This is done by definite references instead of setting out. They are applications for operating authority (temporary or permanent) or orders thereon. All of them are links in the chain directly relating to Sub-No. 60TA. There is no difficulty in ascertaining and knowing just what each of these matters is. This is not an instance of consideration by the Commission of matters either unknown or unknowable, as was the situation in Ohio Bell Tel. Co. v. Public Utilities Comm. of Ohio, 301 U. S. 292, 300-305.

(2) Whether such matters are capable of being presented to this Court as being the record which was considered by the Commission presents the problems of official notice by the Commission of its own records and of evidence in this Court of such records. We think the Commission can take such official notice. Also, we think such official notice is sufficiently manifested—for purposes of Judicial examination —where (as here) such matters are definitely and clearly identified by the Commission as having been considered by it. They thus are capable of being Judicially examined,

provided they are properly brought before the examining Court.

How can they be properly brought before such Court? We take Judicial notice of these applications and orders of which the Commission took official notice (Robinson v. B & O R. R. Co., 222 U. S. 506, 512). Such matters can be brought before the Court, as being the record before the Commission, only by being introduced as evidence (when properly identified as being the matter officially noticed by the Commission).

In examining the action of the Commission, the interest of the Court is centered in and controlled by what was considered by the Commission. In the situation here, the Report and Order thereon have definitely pointed out the matters considered by the Commission; and, from that information, the parties can make a record in this Court which will include all that the Commission considered, even though it may here require evidence to cover matters officially noticed by the Commission.

(3) Orders of the Commission are presumed to be valid and the burden of overthrowing them is upon the attacker (*Swift & Co.* v. *U. S.*, 343 U. S. 373, 382; *I. C. C.* v. *Jersey City*, 322 U. S. 503, 512; *F. P. C.* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602). Such overthrow must be established on the record made in this Court as being the record before the Commission. Such burden is here upon Riss.

There remains the problem of whether the record here is sufficient for our determination of the issues here presented by Riss. In this connection, we must have in mind three basic contentions as follows: (a) that, properly construing temporary certificate Sub-No. 60TA, Riss has not exceeded the authority thereunder; (b) that such proper construction of Sub-No. 60TA is not confined to the same territorial limits as set forth in permanent authority Sub-No. 46, but should be measured by the temporary authority of Sub-No. 46 (which included the "grandfather" claims and certain temporary certificates acquired from Monark); (c) that, even if limited by permanent authority Sub-No. 46, such

limitations have been further contracted arbitrarily and capriciously by ignoring the effect of the right, under temporary Sub-No. 60TA, to transport explosives "To, from and/or between" the points covered in permanent Sub-No. 46.

Solution of each of these issues requires a consideration of permanent Sub-No. 46. The Report here has attached to it, as an "Appendix", a detailed statement of the points from, to and between which Riss is authorized to transport dangerous explosives under its temporary Sub-No. 60TA. The Report (p. 534) states

> "The appendix herein details the extent of Riss' authority to transport dangerous explosives under No. MC-200 (Sub-No. 60TA), from, to, and between the same points and in the same manner that it is authorized to transport other commodities as evidenced in (permanent) certificate No. MC-200 (Sub-No. 46)."

The Report is expressly incorporated in the Order of June 2, 1952 and Riss is ordered to cease and desist from "transportation of dangerous explosives in interstate or foreign commerce under No. MC-200 (Sub-No. 60TA) which are beyond the scope of the operations as specifically described in the appendix of the said report, and that Riss & Company, Inc., shall thereafter confine its operations in the transportation of dangerous explosives under the grant of temporary authority in No. MC-200 (Sub-No. 60TA) to the routes, points and territories, and in the manner set forth in the appendix to the report."

Permanent Sub-No. 46 is thus shown to be an all important matter considered and acted on by the Commission. It is not in evidence in this Court. The statement in the Report that the Appendix follows the provisions of permanent Sub-No. 46 is not evidence here of that fact. In this situation, we must hold that Riss has not brought here enough of the record before the Commission for us to decide, in its favor, the issues it raises here.

Riss has not sustained its burden of overthrowing the Orders. The complaint must be and is

Dismissed.

(S.) KIMBROUGH STONE,
Judge, United States Court of Appeals, retired;
(S.) R. M. DUNCAN,
Judge, United States District Court;
(S.) ALBERT A. RIDGE,
Judge, United States District Court.

APPENDIX "B"

Statutes Involved

Interstate Commerce Act, Part II, 54 Stat. 922.

Sec. 204(c), 49 U. S. C. § 304:

Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.

Administrative Procedure Act, 60 Stat. 237.

Sec. 3(a), 5 U. S. C. § 1002:

RULES.—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of

BLEED THROUGH POOR COPY

its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

Sec. 5, 5 U. S. C. § 1004:

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts *de novo* in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

(a) NOTICE.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) PROCEDURE.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

(c) SEPARATION OF FUNCTIONS.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of *ex parte* matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for an agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

(d) DECLARATORY ORDERS.—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

Sec. 7, 5 U. S. C. § 1006:

In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) HEARING POWERS.—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order

be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) RECORD.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

Sec. 10(e), 5 U. S. C. § 1009:

SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of

an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.